Filed 12/4/12 P. v. Townsend CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEANDRE RUMON TOWNSEND, Defendant and Appellant.	E054755 (Super.Ct.No. RIF10006055) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Deandre Rumon Townsend appeals after he was convicted of one count of robbery, two counts of burglary, and one count of petty theft with three or more priors. He contends that the trial court erred, with respect to the robbery charge, in failing to instruct on a lesser included offense of simple theft. Defendant also contends that the abstract of judgment must be corrected with respect to the imposition of a court security fee. We are not persuaded by defendant's contentions, and we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The instant conviction offenses arise out of a series of crimes defendant committed in the early morning hours of December 14, 2010.

At approximately 1:15 a.m., Robin Stern was working as a cashier in a convenience store in Sun City. Defendant approached the counter where Stern was working and asked for a pack of cigarettes. Stern asked defendant for his identification, but he was either unable or unwilling to provide it. Stern explained that she would be unable to sell the cigarettes without seeing defendant's identification. Defendant stated that he would return with someone who would buy cigarettes for him.

Defendant left the store and returned a short time later with another man, who then attempted to buy cigarettes. Stern explained that she could not sell the cigarettes to him, either, because they were being purchased for defendant, who had not shown proper identification. The other man left the store at that point, but defendant remained and reached inside his jacket with his right hand. Video surveillance tape from the store later

showed an image of defendant with a gun in his right hand. At first, Stern did not see the gun, and thought defendant was kidding when he demanded cash from the register. Then, Stern saw that defendant did have a gun, and said, "'I know you have a gun.'" Defendant responded that, "'if you don't do what I tell you, I am going to use it.'" Stern was very nervous and "scared to death." Defendant demanded that Stern open the register and give him the money inside. Stern complied, giving defendant $30 from the register, and the cigarettes he had initially tried to purchase. Defendant also took money from a charity collection display at the counter, even though Stern asked him not to take it.

Stern described defendant's demeanor as calm and unhesitating. Defendant did not stutter, nor did he appear scared or nervous. Stern complied with defendant's demands because he had threatened to use the gun.

Later that same night, at approximately 2:30 a.m., defendant went into another convenience store in Perris. The cashier, Richard Peden, was in the bathroom at the time. While the cashier was out of sight, defendant entered the area behind the counter and took cartons of cigarettes and cigars from the shelf. The cashier returned as defendant was taking the items. The cashier attempted to accost defendant at the front door, and pleaded with defendant not to steal the cigarettes and other items. Defendant said, "'You see somebody outside behind you.'" When Peden turned to look, defendant dashed out of the store with the cigars and cigarettes. The value of the stolen tobacco products was approximately $175 to $185.

Although the Perris theft began while the cashier was not present in the main part of the store, the events were recorded on the store surveillance video system. The video was later played for the jury.

Defendant was interviewed by police several days later, on December 18, 2010. At first, defendant denied that he had been at either store, and denied committing the crimes. Defendant continued to deny involvement, even after police showed him several photographs from the security cameras, showing defendant inside the stores. Defendant then admitted stealing cigarettes from the Perris store, but said that he did not want to go back to jail. Defendant eventually admitted committing the robbery at the Sun City store also, but blamed a confederate, Tony Guerrero. Defendant claimed that Guerrero had given him the gun and told him to "kill the lady." Defendant said that he was afraid; Guerrero had "brainwashed" him into committing the robbery, and he feared Guerrero would kill him if he did not go through with the robbery.

As a result of these events, defendant was charged with robbery (Pen. Code, § 211) of the clerk in the Sun City store (count 1), burglary (Pen. Code, § 459) as to the Sun City store (count 2) and the Perris store (count 3), and petty theft with three or more priors (Pen. Code, § 490.5) for stealing cigarettes from the Perris store (count 4). The information alleged three prior predicate theft offenses, as well as three prior prison term offenses (a prior burglary, a prior vehicle theft, and a prior petty-theft-with-a-prior offense) under Penal Code section 667.5, subdivision (b). In addition, the information alleged a firearm use enhancement as to the robbery count (count 1).

On the day jury selection began, outside the presence of the jury, defendant admitted the three prior conviction allegations.

At trial, the prosecution presented evidence as outlined above. Defendant presented the testimony of a psychologist who had evaluated him. Dr. Scarf, the psychologist, testified that defendant had a borderline IQ, borderline intellectual functioning, and an articulation disorder, which meant that he did not always process oral information and directions properly. In closing argument, defense counsel urged that defendant's mental deficits and poor adaptability rendered him more susceptible to coercion or duress, and made him more overwhelmed by circumstances.

The jury returned verdicts finding defendant guilty of all four charged offenses. He had earlier admitted the three prior prison conviction enhancement allegations. The trial court sentenced defendant to a total state prison term of 16 years: the middle term of three years for robbery of the Sun City store (count 1), plus 10 years for personal use of a firearm with respect to that count, plus one year for each of the three prison term priors. Defendant was sentenced to two years for the burglary of the Perris store (count 3), to run concurrent to the sentence on count 1. The sentences on counts 2 and 4 were stayed pursuant to Penal Code section 654. As additional parts of the sentence, defendant was ordered to pay a $5,000 restitution fine (Pen. Code, § 1202.4), a (stayed) $5,000 parole revocation fine (Pen. Code, § 1202.45), and a court security fee (Pen. Code, § 1465.8, subd. (a)).

Defendant filed a notice of appeal on October 14, 2011.

ANALYSIS

I. The Trial Court Was Not Required to Instruct on Simple Theft As to the Robbery Count

Defendant first contends that the trial court erred in refusing to give an instruction on the lesser included offense of simple theft, with respect to the robbery count. He argues, "[t]here was no indication [he] ever exhibited the gun or aimed it at [the store clerk] during the theft of cigarettes. Therefore, there was substantial evidence to support a simple theft instruction." Thus, the trial court had a sua sponte duty to instruct on all lesser included offenses supported by the evidence, and it was error to fail to give instructions on theft or attempted robbery.

As defendant acknowledges, the court is required to instruct the jury on any lesser included offenses "when there is substantial evidence for a jury to conclude the defendant is guilty of the lesser offense but not the charged offense." (*People v. Garcia* (2008) 162 Cal.App.4th 18, 24, citing *People v. Breverman* (1998) 19 Cal.4th 142, 177; and *People v. Birks* (1998) 19 Cal.4th 108, 118-119.) Here, however, there was no substantial evidence to support a jury finding that defendant was guilty of the lesser offense, but not the greater.

The store clerk testified that, at first, she did not see that defendant had a gun when he demanded that she give him the cash from the register. Then she saw the gun in his hand. The store video and still photographs obtained from that video showed defendant with a gun in his hand. The clerk testified without contradiction that she then became

frightened and remarked that she knew he had a gun. Defendant proceeded to threaten that he would use the gun if she did not do as he said. Then, in fear for her life, she complied with his demands for money and cigarettes. This uncontradicted evidence is simply not susceptible to the conclusion that defendant committed merely a simple theft without taking the property by force or fear. There was no substantial evidence that defendant had committed the lesser offense (simple theft) but not the greater (robbery).

In addition, any conceivable error was harmless. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621.) "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Here, the matter at issue was decided adversely to defendant on the basis of other, proper instructions, because the jury returned a verdict finding true the enhancement allegation, i.e., that defendant had personally used a firearm in the commission of the robbery. The jury had been instructed that "use" of a firearm meant displaying the weapon in a menacing manner, hitting someone with the firearm, or firing the gun. There was no evidence that defendant had either fired the gun or struck someone with it. The only possible finding the jury could have made was that defendant personally displayed the gun in a menacing manner. This accorded with the victim's testimony, that she saw defendant with the gun in his hand, and that defendant threatened to use it if she did not obey his commands. Her testimony was corroborated by photographic evidence of defendant with the gun in his hand. Given the jury's finding as

to the enhancement, it is not reasonably probable that the result would have been any different had the trial court instructed on the lesser included offense of simple theft. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1267.)

II. The Court Security Fee Recorded in the Abstract of Judgment Is Correct

At defendant's sentencing, the trial court stated that it would "order all the required standard orders of fees and fines. [¶] $120, which represents $30 per conviction, pursuant to Government Code Section 70373. [¶] A $40 [*sic*] conviction charge pursuant to Penal Code Section 1465.8(a)(1). [¶] $30, $10 for each qualifying charge pursuant to Penal Code Section 1202.5." The minutes of the same hearing record that the court ordered that defendant "Pay criminal conviction assessment fee of $120.00 [$30 per convicted charge]; . . . (GC 70373) [¶] Pay Court Operations Assessment of $160.00, $40. per convicted charge. . . . (PC 1465.8(a)(1)) [¶] . . . [¶] Pay fine of $30.00 ($10 per qualifying charge); . . . (PC 1202.5)." The abstract of judgment also reflects "c. Fine(s)" of "$10.00 per PC 1202.5," for each qualifying offense, "d. Court Security Fee: $160.00 per PC 1465.8," and "11. Other orders (specify): Pay criminal conviction assessment fee of $120.00 [$30 per convicted charge] . . . ."

Defendant urges that the court's oral pronouncement as to the court security fee was $40 simpliciter, and not $40 per conviction; thus, it was improper for the minutes and the abstract of judgment to order a $160 total court security fee. The applicable statute, Penal Code section 1465.8, subdivision (a)(1), provides in pertinent part: "(a)(1)

To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on *every conviction* for a criminal offense, including a traffic offense . . . ." (Italics added.) This fee is required to be imposed for "each conviction," even if the sentence on a conviction is stayed. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.)

The trial court made its pronouncement at the same time as it imposed other fines and fees, which were applied to each qualifying conviction. The statutes under which the court imposed the other fines and fees contain similar provisions to Penal Code section 1465.8, subdivision (a)(1). For example, Government Code section 70373, subdivision (a), provides in pertinent part: "(a)(1) To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction." Penal Code section 1202.5 provides in part: "(a) In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed. . . ."

In particular, the language of Penal Code section 1465.8 corresponds to that of Government Code section 70373, in requiring the fee or fine to be imposed for "every conviction for a criminal offense . . . ." The provisions should be construed in parallel also; if Government Code section 70373 requires imposition of a court facilities

assessment of $30 for each misdemeanor or felony conviction, then Penal Code section 1465.8 also requires imposition of a court operations assessment of $40 for each criminal conviction. Defendant suffered four convictions; thus, a court operations assessment of $160 total is required under Penal Code section 1465.8.

In *People v. Schoeb* (2005) 132 Cal.App.4th 861, the Court of Appeal construed the phrase, "every conviction," in Penal Code section 1465.8 to require a defendant to pay the fee for each count of which he or she stands convicted. (*Id.* at pp. 865-866.)

In view of the clear language of the statute, and the construction placed on its language, the trial court here had no discretion to disregard the statutory terms, and to impose only one $40 fine under Penal Code section 1465.8. It is also likely, in view of the inclusion of the court security fee amid the other fines and fees, which were imposed by the court on a per-count basis, that the court simply misspoke or that the statement was reported in error.

In any event, imposing a court security fee of less than $40 per conviction count was not an authorized sentence. (See *People v. Schoeb, supra,* 132 Cal.App.4th 861, 865-866.) Accordingly, even if the abstract of judgment be deemed an error (i.e., the court intended to impose only a single $40 fee), we would order the abstract of judgment corrected to reflect the statutorily required fee of $40 per count, or a total of $160. Inasmuch as the abstract of judgment reflects the proper fee, no amendment to the abstract of judgment is required.

DISPOSITION

For the reasons stated, we reject defendant's claims of error. The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.